Supreme Court, U. S.
FILED
JUN 16 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5780

HOYT WEAVER, PETITIONER

v.

ROBERT GRAHAM,
GOVERNOR OF FLORIDA, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 13, 1979
CERTIORARI GRANTED MARCH 17, 1980

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

4/26/79	Petition for Writ of Habeas Corpus
6/25/79	ORDER TO SHOW CAUSE ISSUED; respondent's response due 7/10/79; petitioner's reply due 7/20/79.
7/9/79	Respondent's response
7/19/79	Petitioner's reply to response of respondent.
10/5/79	Motion to file brief as amicus curiae
10/10/79	ORDER denying Amicus Curiae
11/1/79	OPINION (per curiam) Writ of Habeas Corpus denied.
3/24/80	Certified copy of Order of the U.S. Supreme Court granting the petition for certiorari

IN THE SUPREME COURT OF FLORIDA

HOYT WEAVER, PETITIONER

v

ROBERT GRAHAM, GOVERNOR,
RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS
Filed April 5, 1979

Comes now Hoyt Weaver, the above named Petitioner, and makes known to the Court that Robert Graham, Governor of the State of Florida is presently enforcing a Statute in an unconstitutional and ex-post facto manner. The premises being more fully enumerated as follows:

1. Florida Legislature enacted Florida Statute 944.275 and its effective date was fixed at January 1, 1979.

2. Petitioner was convicted of the offense of second degree murder the 13th day of May, 1976, in the Circuit Court for Hillsboro County, Florida.

3. At the time of the offense the Statutory "good time" Law of Florida gave to Petitioner 5 days per month for each of the first 2 years, 10 days per month for each of the second 2 years and 15 days per month for every year thereafter; and such "good time" was calculated as part of the sentence imposed. (F.S.944.27)

4. On January 1st., 1979, the new "good time" law was applied to Petitioner in a manner clearly detrimental in that said Statute 944.275 gives to Petitioner 3 days per month for the first 2 years, 6 days per month for the 2nd 2 years and 9 days per month for each additional year.

5. Respondent has, thereby, taken away from Petitioner 2 days per month "statutory good time" for the first 2 years of his sentence, 4 days per month for the 2nd 2 years and 6 days per month for every year there after; under a statute enacted after the offense was commited and punishment imposed.

6. Article 1 sec. 8 United States Constitution forbids any ex-post facto law.

7. Florida Constitution Article 1 prohibits any ex-post facto law.

8. Florida Constitution Article 10 sec. 9 forbids the Florida legislature enacting any statute "affecting the prosecution or punishment" for any offense previously committed.

9. Petitioner's sentence was imposed, and statutory good time was considered under chap. 33.11 F.S. and any other method of computation of statutory good time than the method in effect at the time Petitioner was prosecuted and punishment imposed is illegal, unconstitutional, and respondent, as a licensed practicing attorney is liable for his actions.

WHEREFORE, Petitioner moves that a Writ of Habeas Corpus issue out of this Court ordering, directing and commanding that respondent promptly discharge Petitioner from custody; or in the alternate that he show cause why the writ should not issue.

Respectfully Submitted,

/s/ HOYT WEAVER

(pro se)

053366
I Box 1514
P.O. Box 1100
Avon Park, Fla.

AFFIDAVIT OF INSOLVENCY

Being duly sworn and cautioned I do swear and affirm 1) that I am a poor person unable to pay the cost of this action; 2) that this action is taken in good faith; 3) that I have a just and meritorious cause; and, that I should be allowed to proceed in Forma Pauperis. It is so prayed.

/s/ HOYT WEAVER

053366 (pro se)

(Certificate of service omitted in printing)

(Jurat omitted in printing)

IN THE SUPREME COURT OF FLORIDA

[Caption omitted in printing]

RESPONSE

COMES now respondent, by and through his undersigned attorneys, and makes this response to the order to show cause heretofore issued in the captioned proceeding on June 25, 1979 and says:

I.

Petitioner is held in custody pursuant to a commitment issued May 13, 1976, copy of which is attached as Exhibit 1.

II.

Petitioner complains that he is being deprived of "good time" by an *ex post facto* law. In essence, it is claimed that since Section 944.275, Florida Statutes, effective July 1, 1978, permits the accumulation of a lesser amount of "good time" then did its predecessor, Section 944.27, then the application of the new statute to petitioner in the computation of his gain time makes the statute an *ex post facto* law because it was not in effect at the time petitioner was convicted and sentenced. Respondent disagrees. Appellate courts throughout the country have repeatedly recognized that the allowing of gain-time is an act of grace and that a prisoner has no right to receive gain time in the absence of a legislative provision therefor. In other words, gain time allowance is an act of grace rather than a vested right and may be withdrawn, modified, or denied. Please see A.G.O. 078-96, copy of which is attached as Exhibit 2. For the holding of other appellate courts on this issue, please see: *Graham v. Thompson*, 246 F.2d 805 (10th Cir. 1957); *People ex rel. Kleinger v. Wilson*, 5 N.Y.S.2d 934 (S.Ct.App.Div. 3 1938); *Gilstrap v. Clemmer*, 284 F.2d 804 (4th Cir. 1960); *Kastel v. Fish*, 36 F.Supp. 700 (D.C.Md. 1931); *Estrabrook v. King*, 119 F.2d 607 (8th

Cir. 1941); *Comerford v. Commissioner of Correction*, 141 N.E.2d 893 (Mass. 1957); *Comerford v. Massachusetts*, 233 F.2d 294 (1st Cir. 1956), cert. denied 352 U.S. 899; *Lembersky v. Parole Board of Dept. of Correction*, 124 N.E.2d 521 (Mass. 1955); *People ex rel. Colletti v. Pate*, 201 N.E.2D 521 (Mass. 1955); *People ex rel. Colletti v. Pate*, 201 N.E.2d 390 (Ill. 1964); *Hiatt v. Compagna*, 178 F.2d 42 (5th Cir. 1949), aff'd 340 U.S. 880; *Shattuck v. Grider*, 493 P.2d 829 (Okla.Crim.App. 1972), citing *Dear v. Mayo*, 14 So.2d 267 (Fla. 1943), with approval.

III.

Although Section 944.275 was effective July 1, 1978, it was not implemented until January 1, 1979. This means that petitioner's gain time was computed under the provisions of Section 944.27 up until January 1, 1979 and thereafter computed pursuant to the provisions of Section 944.275. So that petitioner may have an up-to-date computation of his time and a tentative expiration date, respondent attaches the affidavit of Louie L. Wainwright showing the computation of petitioner's time and a projected release date of February 2, 1987, the same being attached as Exhibit 3.

IV.

Each and every allegation challenging the legality of petitioner's incarceration not heretofore specifically answered or denied is hereby severally denied and the contrary allegation lodged.

CONCLUSION

The petition for writ of habeas corpus should be denied.

JIM SMITH
Attorney General

By: _____

WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR RESPONDENT
The Capitol
Tallahassee, Florida 32301

(Certificate of service omitted in printing)

EXHIBIT 1 TO RESPONSE OF RESPONDENT

STATE OF FLORIDA

UNIFORM COMMITMENT TO CUSTODY OF DIVISION OF CORRECTIONS

CIRCUIT COURT CRIMINAL JUSTICE DIVISION
(Court)

HILLSBOROUGH County. SPRING Term, 19 76

Conviction for MURDER IN THE SECOND DEGREE
(Offense)

Date of conviction MAY 13th, 1976

Date of sentence imposed MAY 13th, 1976

Term of sentence FIFTEEN (15) YEARS with credit time from January 31, 1976

STATE OF FLORIDA,

Plaintiff,

vs.

Hoyt Weaver
Defendant.

O 53386

JUN 7 1976

"Case No. #76-739 B "

"WHITE MALE"

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO THE SHERIFF OF SAID COUNTY AND THE DIVISION OF CORRECTIONS OF SAID STATE, GREETING:

The above named defendant having been duly charged with the above named offense in the above styled Court, and he having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears from the attached certified copies of

(Indictment) (Information)

judgment and sentence, which are hereby made parts hereof;

Now, therefore, this is to command you, the said Sheriff, to take and keep and, within a reasonable time after receiving this commitment, safely deliver the said defendant into the custody of the Division of Corrections of the State of Florida; and this is to command you, the said Division of Corrections, by and through your director, superintendents, wardens, and other officials, to keep and safely imprison the said defendant for the term of said sentence in the institution in the state correctional system to which you, the said Division of Corrections, may cause the said defendant to be conveyed or thereafter transferred. And these presents shall be your authority for the same. Herein fail not.

WITNESS the Honorable Charles H. Scruggs, III

Judge of said Court, as also James F. Taylor, Jr.,

Clerk, and the Seal thereof, this the 13 day of May, 19 76

James F. Taylor, Jr.
Clerk of said Court

BY [illegible] D.C.

(To be used in committing defendants under indeterminate sentences as well as under sentences of imprisonment for definite periods.)

EXHIBIT 2 TO RESPONSE OF RESPONDENT

STATE OF FLORIDA
DEPARTMENT OF LEGAL AFFAIRS
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
Tallahassee, Florida 32304

JULY 18, 1978

078–96

Mr. LOUIE L. WAINWRIGHT
Secretary, Department of
Offender Rehabilitation
1311 Winewood Boulevard
Tallahassee, Florida 32301

Re: GAIN-TIME—PRISONERS—DEPARTMENT OF OFFENDER REHABILITATION—applicability of new gain-time formula prescribed by 1978 House Bill 811 to all inmates incarcerated on July 1, 1978. House Bill 811; § 944.27, F.S. (1977); § 944.275, F.S. (1978 Supp.).

DEAR MR. WAINWRIGHT:

This is in response to your request for an opinion on the following questions regarding 1978 House Bill 811, effective July 1, 1978:

(1) DOES HOUSE BILL 811 AFFECT ALL INMATES INCARCERATED IN THE DEPARTMENT OF OFFENDER REHABILITATION ON THAT DATE?

(2) IF THE ANSWER TO QUESTION (1) ABOVE IS NO, DOES HOUSE BILL 811 APPLY TO ALL PERSONS *SENTENCED* AFTER JULY 1, 1978, OR ONLY TO PERSONS SENTENCED FOR CRIMES *COMMITTED* AFTER JULY 1, 1978?

House Bill 811, the effective date of which is July 1, 1978, revised the formula by which gain-time may be granted to prisoners by the Department of Offender Rehabilitation. Sections 944.27, 944.271 and 944.29, F.S.

(1977), were repealed and a new § 944.275, F.S., was created to replace the repealed sections. I have found nothing in the new § 944.275, or in any section of HB 811, or in the title to the bill, indicating that the new gain-time provisions were not intended to apply to all prisoners incarcerated by the Department of Offender Rehabilitation on July 1, 1978. There is no language in the bill limiting or delaying application to those prisoners sentenced after July 1, 1978, nor is there any language limiting application to those prisoners incarcerated for crimes committed after July 1, 1978. In addition, I know of no constitutional prohibition or rule of construction which would be invoked or violated by the application of the new formula to all inmates incarcerated by the Department as of the effective date of the act (July 1, 1978). I find nothing to indicate that the statute will not operate prospectively only. Also, nothing in HB 811 imposes any additional penalty for a crime already committed, or makes more severe punishment already imposed, and nothing in the bill purports to deprive any inmate of any vested, enforceable right.

Although the courts have imposed certain procedural requirements as being necessary to guarantee due process when previously granted gain-time is to be forfeited by action of an administrative agency, such as the Department of Offender Rehabilitation, e.g., Rankin v. Wainwright, 351 F. Supp. 1306 (M.D. Fla. 1972), it seems clear that the *Legislature's* allowance of gain-time and its modification, restriction, or even abolition of gain-time is subject to the broad discretion of the Legislature. The courts have repeatedly emphasized that the allowing of gain-time is an act of grace, and that a prisoner has no right to receive gain-time absent the Legislature's exercise of its grace or discretion. Similarly, the courts have emphasized the Legislature's power to make whatever changes it deems prudent in the gain-time procedure. In *Dear* v. *Mayo*, 14 So.2d 267 (Fla. 1943), the court stated: "Parole and gained time is granted by the sovereign as a matter of *grace rather than of right*," and that "[t]he state may offer such grace under and subject to such conditions as it may con-

sider most conducive to accomplish the desired purpose." (e.s.) In *Mayo* v. *Lukers*, 53 So.2d 916, 917 (Fla. 1951), it was stated that "[t]he cases generally hold that the granting of the gain-time allowance is an act of grace rather than a vested right which may be withdrawn, modified, or denied, dependent on the course of conduct of the prisoner." And, in *Kimmons* v. *Wainwright*, 338 So.2d 239 (1 D.C.A. Fla. 1976), the court stated that "[g]ain-time is given to prisoners through the beneficence of the Legislature, and the Legislature has full authority to establish the terms and conditions thereof."

Thus, your first question is answered in the affirmative, and, accordingly, your second question need not be addressed.

SUMMARY

House Bill 811, which revises the method of granting gain-time, applies to all inmates incarcerated by the Department of Offender Rehabilitation on July 1, 1978, the effective date of the bill.

Sincerely,

/s/ _____

ROBERT L. SHEVIN
Attorney General

Prepared by:

/s/ _____

JERALD S. PRICE
Assistant Attorney General

RLS/JSP/acb

EXHIBIT 3 TO RESPONSE OF RESPONDENT

LOUIE L. WAINWRIGHT
Secretary, Department of Corrections
1311 Winewood Boulevard
Tallahassee, Florida 32301
Telephone: 904-488-5021

AFFIDAVIT

STATE OF FLORIDA

COUNTY OF LEON

Personally appeared before me this day Louie L. Wainwright, who being duly sworn, deposes and says:

That he is the Secretary of the Department of Corrections; that as such Secretary he is the official custodian of all prisoners and the records pertaining thereto:

That Hoyt Weaver, #053366, received a 15-year sentence with credit for 103-days county jail time on May 13, 1976, in the Hillsborough County Circuit Court for the offense of Second Degree Murder;

That Mr. Weaver's sentence has been computed under provision of Section 944.27 Florida Statute, (Repealed) until January 1, 1979 and the remainder of the sentence computed under provision of Section 944.275 Florida Statute to arrive at a projected release date of February 2, 1987, calculated as follows:

Date of sentence 5/13/76	=	27892	(Days elapsed since 1900)
Sentence in days (15-years)	+	5475	
Jail Time Credit	−	103	
Statutory Gain Time earned on 1065-days served prior to 1/1/79	−	343	
Gain Time forfeited due to disciplinary reports prior to 1/1/79	+	165	
Extra Gain Time earned prior to 1/1/79	−	43	

Statutory Gain Time earned or to be earned on 2955 served or to be served from 1/1/79	–	1234
Projected release date 2/2/87	=	– 31809 (Days elapsed since 1900)

/s/ _____

LOUIE L. WAINWRIGHT, SECRETARY
Department of Corrections

(Jurat omitted in printing)

IN THE SUPREME COURT OF FLORIDA

[Caption omitted in printing]

PETITIONER'S REPLY TO RESPONSE OF RESPONDENT

Comes now the Petitioner, Hoyt Weaver, in proper person, and replies to the response of Respondent.

Petitioner would show:

1. Petitioner's filing of March 18, 1979, contended that his expiration date had been recomputed pursuant to Florida Statute 944.275 with an effective date of January 1, 1979. This claim is conceded by Respondent and is not, therefore, at issue.

2. Petitioner further contended that such application of the above cited Statute as to Petitioner constituted the enforcement of an ex post facto law by Respondent in that the criminal conduct giving rise to Petitioner's imprisonment occurred prior to the effective date of Florida Statute 944.275, and that the application of Florida Statute 944.275 as to Petitioner, is clearly detrimental to Petitioner.

3. Respondent's response is apparently based solely on a claim that statutory gain time is an act of grace by the Legislature rather than a vested right although, by reference to Attorney General Opinion 078-96 (Respondent's Exhibit 2), Respondent also contends ". . . . nothing in HB 811 imposes an additional penalty for a crime already committed or makes more severe punishment already imposed, and nothing in the bill purports to deprive any inmate of any vested, enforceable right." (Respondent's #2 at Page 2).

4. Both claims by Respondent are without merit. At the time Petitioner entered the Florida Prison System Petitioner did acquire a vested right to the expiration date established for his sentence pursuant to Florida Statute 944.27, the gain time law in effect at the time of the criminal conduct for which he stood convicted. This Statute, when applied to Petitioner's sentence, did specify, with

particularity, a date certain when Petitioner's actual imprisonment would terminate and conditional release would begin. His gain time pursuant to 944.27 was awarded to him in advance and could be taken or forfeited only for certain breeches of prison rules or the law and only in the presence of certain procedural safeguards. This date has now been altered pursuant to Florida Statute 944.275 to Petitioner's disadvantage. Relief is mandated by the following U.S. Supreme Court and Florida Supreme Court Cases:

1. Calder v Bull, 3 US (3 Dall) 386, 390, 1 L Ed 648 (1798)
2. Cummins v Missouri, 4 Wall 277, 18 L Ed 356, 71 US 277 (1866)
3. Kring v Missouri, 107 US 221, 2 S Ct. 443, 27 L Ed 506 (1882)
4. In re Medley, 134 US 160, 10 S Ct. 384, 33 L Ed 835 (1890)
5. Duncan v Missouri, 152 US 377, 14 S Ct. 570, 38 L Ed 485 (1894)
6. Thompson v. Utah, 170 US 343, 18 S Ct. 620, 42 L Ed 1061 (1898)
7. Malloy v S Carolina, 237 US 180, 35 S Ct. 507, 59 L Ed 905 (1915)
8. Lindsey v Washington, 301 US 397, 57 S Ct. 797, 81 L Ed 1182 (1937)
9. Higginbottom v St., 88 Fla 26, 101 So 233 (Fla 1924)
10. Wilensky v Fields, 267 So 2d 1 (Fla 1972)

5. Documents unavailable to Petitioner at the time of the original filing demonstrates the effect of this application. Petitioner's Exhibit A, reflecting a T.E.D. of December 31, 1984, and Respondent's Exhibit 3 (Petitioner's Exhibit B), reflecting a T.E.D., *because of the recomputation* pursuant to Florida Statue 944.275, of February 2, 1987.

6. A fuller and more complete analysis of Respondent's legal argument demonstrating the absence of merit and reflecting unequivocally that Petitioner is entitled to the relief sought is appended hereto (Petitioner's Exhibit C)

and is "Petitioner's Reply", absent Petitioner's exhibits, filed in *William P. Besser v Robert Graham, Case No. 57,021*, which argument, with all other law and argument submitted by Petitioner Besser, Petitioner would respectfully incorporate by reference. (See sections I–V, pp 2–7, Exhibit C, excluding facts applicable solely to Petitioner Besser.)

WHEREFORE, on the basis of the foregoing and attached Petitioner has demonstrated:

1. That when Petitioner entered the Florida Prison System, the Department of Corrections, applying Florida Statute 944.27, established a date certain for Petitioner's release from actual imprisonment on conditional release;

2. That due to the retroactive application of Florida Statute 944.275, as to Petitioner by Respondent, this date certain has been changed to Petitioner's disadvantage; and,

3. Such application by Respondent of Florida Statute 944.275 as to Petitioner is in direct violation of the Florida Constitution: Article I, Section 10; Article X, Section 9; and The United States Constitution Article I, Sections 9 and 10.

The Writ should issue.

Respectfully submitted,

HOYT WEAVER #053366 (pro se)
P.O. Box 1100, Slot 1514
Avon Park, Florida 33825

(Certificate of service omitted in printing)

EXHIBIT A TO REPLY OF PETITIONER

FLORIDA PAROLE AND PROBATION COMMISSION
OBJECTIVE PAROLE GUIDELINES WORKSHEET

Inmate Number: 053366 Inmate Name: Hoyt Weaver

TED: 12-31-84 Institution: Avon Park CI Date of Interview: 3-7-79

ITEM A

Number of All Prior Convictions
Three or more prior convictions=2
One or two prior convictions=1
No prior convictions (adult or juvenile)=0

2

ITEM B

Number of Prior Incarcerations
Two or more prior incarcerations=2
One prior incarceration=1
No prior incarcerations=0

2

ITEM C

Total Time Served in Years
Two or more years served=2
Up to two years served=1
No time previously served=0

2

ITEM D

Age of First Commitment (Adult or Juvenile)
17 years or younger=2
18 - 25 years =1
26 years or older=0

1

ITEM E

Number of Prior Parole Revocations or MCR Revocations
One or more prior revocations=1
No prior revocations=0

1

ITEM F

Number of Prior Escapes=1
No prior escapes=0

0

ITEM G

Burglary as Present Offense of Conviction
Present offense involves burglary=1
Otherwise=0

0

TOTAL SCORE 8

OFFENSE CHARACTERISTIC: 2nd degree murder - Greatest (Most Serious)

Matrix Time Range 78-120
Recommended Time 120

5-13-76
Start 1-31-76
County Jail Credit 103 (days)
Time Since Sentence 33 M 22d (mn. & days)
Total Time Served 37M 44d(mo. & days)

AGGRAVATING/MITIGATING CIRCUMSTANCES (Circle as appropriate; Insert Code No., Category and Explanation)

36
1
37
24
9
33

illegible

INMATE OR EXAMINER CONTEST OF SCORING: (Explain in detail)

RECOMMENDED PRESUMPTIVE PAROLE RELEASE DATE: 1-31-86

ACKNOWLEDGEMENT OF INTERVIEW:

/s/ Hoyt Weaver 1-31-76 /s/ signature illegible
Inmate Signature 10 Examiner

/s/ signature, illegible 1-31-86
Dept. of Corrections Representative Examiner

Form A: 1 Copy to Inmate
1 Copy to institution file
1 Copy with Form B to Central Office Work Processing

[THE INFORMATION ON THIS FORM HAS BEEN TRANSCRIBED FROM LONGHAND]

Exhibit B to the Reply of Petitioner is identical to the second page of Exhibit 3 to the Response of the Respondent, reproduced, *supra*, at pp. 12a–13a, and is omitted here.

Exhibit C to the Reply of Petitioner is essentially an argument of law and is omitted here.

SUPREME COURT OF FLORIDA

No. 56,707

HOYT WEAVER, PETITIONER,

v.

ROBERT GRAHAM, GOVERNOR, RESPONDENT.

[November 1, 1979]

PER CURIAM.

The petition for writ of habeas corpus is denied. *See Harris v. Wainwright*, Case No. 56,716 (Fla. Nov. 1, 1979).

ADKINS, Acting Chief Justice, BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., Concur

Original Jurisdiction—Habeas Corpus

Hoyt Weaver, in proper person, Avon Park, Florida, for Petitioner

Jim Smith, Attorney General; and Wallace E. Allbritton, Assistant Attorney General, Tallahassee, Florida, for Respondent

SUPREME COURT OF FLORIDA

No. 56,716

HENNARD HARRIS, PETITIONER,

v.

LOUIE L. WAINWRIGHT, RESPONDENT.

[November 1, 1973]

ADKINS, Acting Chief Justice.

In original habeas corpus proceedings, petitioner asserts that section 944.275 Florida Statutes (1978 Supplement) is unconstitutional as it is applied to him, in that he is harmfully required to remain in prison for an indeterminate number of months or years past the original expiration of the sentence under the law as it existed at the time of the offense. This statute, known as the "gain time statute" requires the Department of Corrections to grant deduction for gain time on a monthly basis, as earned, from the sentence of every prisoner who has committed no infraction of the rules of the department or of the laws of the state and who has performed in a satisfactory and acceptable manner the work, duties, and tasks assigned.

Petitioner says that under the former law, section 944.27 Florida Statues (1977) he was credited with all of his statutory gain time in advance at the time he was received into the custody of the Department of Corrections.

The new law (1978) is different from the former law (1977) in that there is an award of three days per month instead of five for the first two years; the award of six days per month instead of ten for the second two years; and the award of nine days per month instead of fifteen for anything over four years service of sentence.

Instead of awarding or crediting a prisoner with the statutory gain time at the old rate according to the

number of years sentenced and time served, the Department of Corrections would credit such gain time monthly (rather than in advance) at the new lesser rate and then only according to the number of years served. The "up front" awarding of gain time under the prior law was merely an administrative method by which an expiration date of sentence was tentatively calculated. Under either the old law or the new, gain time, whether it be what is normally considered "statutory" or "extra", only comes into play if a given inmate conducts himself in such a way as to deserve the gain time. Therefore, any notion of gain time can only be considered, at best, as conditionally vested.

Petitioner says that the statutory gain time credited in advance by the Department of Corrections under section 944.27, Florida Statutes (1977) was the custom by departmental rule and thus has become a vested right, at least insofar as petitioner is concerned. He says that the department entered into a binding contractual arrangement when petitioner entered prison that he would be able to receive and keep the statutory gain time in the absence of disciplinary problems. Petitioner contends that he is being deprived of "good time" by an ex post facto law. In essence, it is claimed that since section 944.275, Florida Statutes (1978) permits the accumulation of a lesser amount of good time than did its predecessor, section 944.27, Florida Statutes (1977), then the application of the new statute to petitioner and the computation of his gain time makes the statute an ex post facto law as it was not in effect at the time petitioner was convicted and sentenced.

Appellate courts throughout the country have repeatedly recognized that the allowing of gain time is an act of grace and that a prisoner has no right to receive gain time in the absence of a legislative provision therefor. In other words, gain time allowance is an act of grace rather than a vested right and may be withdrawn, modified, or denied. *See Gilstrap v. Clemmer*, 284 F.2d 804 (4th Cir. 1960; *Hiatt v. Compagna*, 178 F.2d 42 (5th Cir. 1949) *aff'd.* 340 U.S. 880 (1950); *Estrabrook v. King*, 119 F.2d

607 (8th Cir. 1941); *Kastel v. Fish*, 36 F. Supp. 700 (D.C. Md. 1931); *Shattuck v. Grider*, 493 P.2d 829 (Okla.Crim.App. 1972) citing with approval *Dear v. Mayo*, 153 Fla. 114, 14 So.2d 267 (Fla. 1943); *People ex rel. Coletti v. Pate*, 201 N.E.2d 390 (Ill. 1964); *Comerford v. Commissioner of Correction*, 141 N.E.2d 893 (Mass. 1957); *Lembersky v. Parole Board of Department of Correction*, 124 N.E.2d 521 (Mass. 1934).

Although section 944.275, Florida Statutes, was effective July 1, 1978, it was not implemented until January 1, 1979. This means that petitioner's gain time was computed under the provision of section 944.27, Florida Statutes (1977), until January 1, 1979, and thereafter computed pursuant to the provision of section 944.275, Florida Statutes (1978).

Mayo v. Lukera, 53 So.2d 916 (Fla. 1951) recognizes that the right to gain time is not a vested one and that it is obviously dependent on the course of the conduct of the inmate. This Court has emphasized the legislature's power to make whatever changes it deems prudent in the gain time procedure. In *Dear v. Mayo*, 153 Fla. 164, 14 So.2d 267 (Fla. 1943), this Court said that parole and gain time is granted by the sovereign as a matter of grace rather than of right and that the state may offer such grace under and subject to such conditions as it may consider most conducive to accomplish the desired purpose. In *Kimmons v. Wainwright*, 338 So.2d 239 (1st DCA 1976), the court said that gain time is given to prisoners through the beneficience of the legislature, and the legislature has full authority to establish the terms and conditions thereof.

This is not a situation in which a new law has been passed eliminating the allowance of gain time in certain situations. *Dowd v. Sims*, 229 Ind. 54, 95 N.E.2d 628 (Ind. 1950). This is not a situation in which the entire scheme of criminal penalties has been revised. *Goldsworthy v. Hannifin*, 86 Nev. 252, 468 P.2d 350 (Nev. 1970). It is not a situation in which the length of incarceration for juvenile offenders has been extended. *In re Dowing*, 564 P.2d 375 (Cal. 1977); *In re Valenzuela*, 79 Cal. Retr. 760, 275 Cal.

App.2d 483 (3d Dist. 1969). Likewise, it is not a situation involving a new and different interpretation of existing law. *Love v. Fitzharris*, 460 F.2d 382 (9th Cir. 1972).

The petition for writ of habeas corpus is denied.

It is so ordered.

BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., Concurring

Original Jurisdiction—Habeas Corpus

Bannard Harris, in proper person, Raiford, Florida,
for Petitioner

Jim Smith, Attorney General, and A.S. Johnston, Assistant Attorney General, Tallahassee, Florida,
for Respondent

Supreme Court of the United States

No. 79-5780

HOYT WEAVER, PETITIONER,

v.

ROBERT GRAHAM, Governor of Florida

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of Florida.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 17, 1980

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